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In the Supreme Court of the United States

OCTOBER TERM, 1976

WILLIAM CHADBOURNE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *en banc* opinion of the court of appeals (Pet. App. A) is reported at 538 F. 2d 1230. The earlier opinion of a panel of the court of appeals (Pet. App. B) is reported at 525 F. 2d 1275.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on September 20, 1976. On September 28, 1976, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including November 19, 1976. The petition was filed on November 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless search of petitioner's truck in a parking lot upon probable cause to believe that it contained contraband was compatible with the requirements of the Fourth Amendment.

STATEMENT

1. An indictment returned in the United States District Court for the Western District of Texas charged petitioner with one count of having conspired to import and possess marijuana illegally, in violation of 21 U.S.C. 963 and 846, and one count of having illegally possessed marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner moved before trial to suppress 400 pounds of marijuana seized during the warrantless search of a camper truck in which he had been seated, and arrested, prior to the search. After an evidentiary hearing, the court denied the motion.

Petitioner then waived a jury trial and was convicted by the court on both counts. The court thereafter dismissed the conspiracy count and sentenced petitioner to a term of five years' imprisonment on the possession count followed by a special parole term of five years. A panel of the court of appeals reversed, holding that although probable cause existed to search the camper, the warrantless search could be sustained neither under the "automobile exception" to the warrant requirement nor as a border search (Pet. App. 18a-23a). The court of appeals *en banc* reversed the panel decision, holding that the warrantless search was justified by exigent circumstances (Pet. App. 6a-11a).[1]

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[1]The court therefore did not reach the issue whether the search was a valid border search. Pet. App. 11a, n. 4.

2. As adduced at the suppression hearing, the evidence showed that in early 1973 John Mancuso, a private citizen, answered an advertisement in a New Jersey newspaper soliciting someone to drive vehicles from Mexico into the United States. In response to mailed instructions from the "company" placing the advertisement, Mancuso flew to Monterrey, Mexico, in February 1973 to pick up a rental car and to drive it into the United States.[2] When Mancuso arrived in Monterrey, however, the car was not there as arranged; he therefore rented a car himself and drove back across the border, after which he flew home to New Jersey (A. 52-53; S.A. 7-8).

In April 1973, Mancuso again flew to Mexico in accordance with telephone instructions. On this trip he drove a camper truck over the border to the Northeast Holiday Inn of San Antonio, Texas; he left the vehicle at the Inn and, as instructed, threw away the keys (S.A. 8-9, 12). Upon returning to New Jersey he received a call to meet someone at a bar in New York City. At this meeting an unknown person gave Mancuso an envelope containing $5,000 as a "bonus" for his services (A. 35-36). Mancuso then became suspicious about the nature of his employment and contacted the police.

Subsequent investigation by federal agents established that the "Green Transportation Company," which had placed the newspaper advertisement for drivers, was

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[2]The purpose of this trip, according to Mancuso's instructions, was to familiarize him with "the area and the routes" that he would be taking on subsequent trips (A. 54). The mailed instructions were accompanied by airline tickets and $250 in cash (A. 53; S.A. 7-8).

"A." refers to the appendix and "S.A." to the supplemental appendix filed with the court of appeals.

fictitious and that the telephone numbers called by Mancuso to contact the "company" belonged to public telephones already suspected by the agents to be linked to a scheme to import narcotics illegally (S.A. 8, 11, 22-23).

In early October 1973, Mancuso was again contacted by the "company" and told to drive the same camper truck that he drove in April from the border town of Matamoros, Mexico, to the San Antonio Holiday Inn on October 13. Upon arriving in Matamoros, however, he learned that the vehicle was not ready, and he returned to New Jersey (S.A. 11-14). Later that week he received instructions to carry out the plan as arranged and to cross the border into Texas at noon on October 21. Mancuso disclosed this plan to the federal agents, who arranged for surveillance of the camper truck from the time that it crossed the border until its arrival in San Antonio, where they hoped to arrest persons connected with the smuggling operation (S.A. 90). The agents set up a videotape surveillance unit at the San Antonio motel to record the possible transfer of possession (Pet. App. 5a).

Mancuso crossed the border as scheduled and, approximately seven hours later, parked the truck in the San Antonio motel parking lot (S.A. 40). A red Buick had been observed following the truck most of the way to San Antonio (S.A. 39). Shortly after the truck arrived, the agents saw petitioner transfer various objects from the Buick to the camper, including equipment suitable for elevating the camper shell from the truck bed. Petitioner then locked the truck and drove off (Pet. App. 5a).

Approximately one-half hour later petitioner returned to the motel parking lot by taxi and entered the truck cab with the ignition key in his hand. The agents then closed in and arrested petitioner (S.A. 113). A cursory inspection of the vehicle revealed no contraband, but,

after the agents summoned trained dogs who detected the presence of marijuana, they pried up the camper from the truck bed and discovered traces of marijuana. A later search uncovered 400 pounds of marijuana concealed between the camper floor and the truck bed (S.A. 65-66, 120-121).

ARGUMENT

Petitioner contends that the warrantless search in this case was impermissible under the Fourth Amendment because the agents allegedly possessed probable cause to search the truck well before petitioner sought to drive it away (Pet. 7-13) or, alternatively, because the vehicle was effectively immobilized after petitioner's arrest (Pet. 13-15).

1. For the reasons set forth in our brief in *United States* v. *Chadwick*, No. 75-1721, certiorari granted, October 4, 1976 (pp. 15-46),[3] we do not believe that the Fourth Amendment presumptively requires a warrant to seize or search, on probable course, vehicles that are parked in public places and in which the owner therefore has a circumscribed expectation of privacy. This lesser expectation of privacy, when coupled with the difficulties created by the inherently mobile nature of the automobile, justifies a search of an automobile upon probable cause[4] and without a warrant, even though a warrantless search of a private house or office under comparable conditions would not be tolerated. In our view, this position is consistent both with the language and history of the

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[3]We are sending petitioner a copy of our brief in *Chadwick*.

[4]Petitioner does not dispute that the federal agents had probable cause to search the truck for contraband.

Fourth Amendment (*Chadwick* brief, pp. 15-29) and with the principles developed in the decisions of this Court (*Chadwick* brief, pp. 29-37).

We do not believe, therefore, that the government must demonstrate "exigent circumstances" in order to avoid suppression of the evidence uncovered by the warrantless search of petitioner's vehicle. We recognize that, if the outcome of this case depended solely upon the validity of the foregoing theory, it would be appropriate for the Court to hold the case pending its disposition of *Chadwick*. We believe, however, that the facts of this case bring it well within the established perimeters of the "automobile search" exception to the warrant requirement and thus that a rejection by this Court of our position in *Chadwick* would not affect the outcome of this case.

2. This Court has recognized on numerous occasions that "[a]utomobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office" (*Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 221, quoted in *Chambers* v. *Maroney*, 399 U.S. 42, 50). See also *Texas* v. *White*, 423 U.S. 67. Moreover, "[b]esides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *South Dakota* v. *Opperman*, No. 75-76, decided July 6, 1976, slip op. 3. Although "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 461-462), a warrantless search of an occupied vehicle about to be driven away is permitted upon probable cause.

This Court stated in *Coolidge*: "[I]t seems abundantly clear that there is a significant constitutional difference

between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose" (403 U.S. at 463, n. 20). In the present case, the vehicle was not on petitioner's private property, was occupied, and was being used for an illegal purpose, *viz.*, the distribution of contraband drugs. Indeed, since the vehicle was being used to transport contraband, it was subject to seizure for forfeiture without judicial process (21 U.S.C. 881(a)(4) and 881(b)(4)) and thereafter to a warrantless search under *Cooper* v. *California*, 386 U.S. 58.

We do not believe that either the opinion of the Court in *Coolidge* or the discussion in Mr. Justice Stewart's dissenting opinion in *Cardwell* v. *Lewis*, 417 U.S. 583, 598-599, suggests any doubt about the correctness of the decision here. In delineating the controversial aspects of the automobile search exception, those opinions focused on the great improbability, in the circumstances of those cases, that the vehicles would have been removed while a warrant was procured. Of critical importance to the analysis in each instance was the fact that the vehicles' owners had been arrested in a place removed from and at a time prior to the seizure of the vehicles. In the instant case, on the other hand, petitioner's vehicle was seized at the time of his arrest, which took place when he was actually occupying the vehicle, about to drive it off.

Petitioner does not, in fact, appear to dispute these general principles. Rather he argues that the principles must be disregarded in this case because the agents had sufficient time to obtain a warrant before the search. That contention is foreclosed by *Husty* v. *United States*, 282 U.S. 694.

The facts in *Husty* are strikingly similar to the facts in the present case. There, the police had probable cause to believe that Husty's vehicle contained bootleg liquor. They located

the vehicle and staked it out. After the passage of some time (sufficient to have permitted the procurement of a search warrant), Husty and two companions arrived, entered the car, and started the motor. Husty was thereupon stopped by the officers, the car was searched, and 18 cases of whiskey were found. The Court sustained the warrantless search under the principle enunciated in *Carroll* v. *United States*, 267 U.S. 132, and further held that "[t]he search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant" (282 U.S. at 701).

The plurality opinion of Mr. Justice Blackmun in *Cardwell* v. *Lewis*, *supra*, takes a similar position. Rejecting an argument that the police should be precluded from making a warrantless seizure of a vehicle because probable cause to search it had existed "for some time prior to" the arrest of its owner, Mr. Justice Blackmun observed (417 U.S. at 595-596):

> Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practical moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of the arrest. Cf. *Chambers* [v. *Maroney*, 399 U.S.] at 50-51. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

Finally, there is no merit to petitioner's additional contention that the decision below is "contrary to every pronouncement on the subject by * * * the other federal courts of appeals" (Pet. 7). Petitioner has cited no case in which any court of appeals has invalidated a warrantless, probable-cause search of a vehicle seized while it was occupied and about to be driven away. Indeed, the searches in the cited cases (Pet. 11), involving both occupied and unoccupied vehicles, were uniformly upheld in the light of this Court's decisions regarding automobile searches. At most, petitioner has demonstrated that some courts of appeals are uncertain about the precise outer perimeter of the automobile search doctrine with regard to unoccupied vehicles (*United States* v. *Robinson*, 533 F. 2d 578 (C.A. D.C.); *United States* v. *Farnkoff*, 535 F. 2d 661 (C.A. 1)), an issue that this Court need not resolve on the facts of this case.

3. Petitioner also contends (Pet. 13-15) that, even though exigent circumstances may have existed before he was arrested, the exigency dissipated at that point, making necessary a warrant to search the truck.

As the court of appeals correctly recognized (Pet. App. 7a), petitioner's argument is foreclosed by this Court's decisions in *Chambers*, *supra*, and *Cardwell*, *supra*: "Both of these authorities recognize that exigence is to be determined as of the time of seizure of an automobile, not as of the time of its search; the fact that in these cases sufficient time to obtain a warrant had passed between each seizure and the corresponding search did not invalidate either." The court of appeals also rejected (Pet. App. 8a) petitioner's suggestion that the presence of numerous agents in the motel parking lot required a different result: "We have never before tested mobility of automobiles or exigence of circumstances by evaluating police

capability to respond or the balance of forces deployed. Once commenced, the end of such a calculus would be evaluation of the opposing armaments and of the relative top speeds of the vehicles. We decline to embark on it." See also *Husty* v. *United States*, *supra*.

Petitioner attempts to avoid the effect of *Chambers* and *Cardwell* by arguing (Pet. 13) that there was "no need to search *or* seize the vehicle" (emphasis in original) without a warrant after his arrest, apparently because the vehicle was in a "semi-private parking lot" and agents were still in the vicinity. However, this Court noted in *Chambers*, *supra*, 399 U.S. at 52: "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." Similarly, there is no constitutional difference between actually holding a car and, as petitioner would have it, effectively immobilizing the car without seizing it to prevent its removal. Nor do we perceive a meaningful distinction in the fact that the truck was parked in a motel parking lot rather than on a public road. Reviewing a similar contention in *Cardwell*, *supra*, Mr. Justice Blackmun stated in his plurality opinion (417 U.S. at 594-595): "The fact that the car in *Chambers* was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance. The same arguments and considerations of exigency, immobilization on the spot, and posting a guard obtain."[5]

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[5]Contrary to petitioner's suggestion (Pet. 14), the circuits are not in conflict on this issue. The Court of Appeals for the District of Columbia Circuit, in *United States* v. *Robinson*, 533 F. 2d 578 (*en banc*), upheld a warrantless search on another rationale and simply found it unnecessary to decide whether the mobility of the searched automobile also justified the search. The Fourth Circuit, in *United States* v. *Bradshaw*, 490 F. 2d 1097, invalidated a warrantless search, but placed particular emphasis (*id.* at 1103) on the fact that the vehicle was "parked on defendant's property, a circumstance, we believe, which enhances the defendant's expectation of privacy with respect to its contents"; *Bradshaw* was explicitly so limited in *Weaver* v. *Williams*, 509 F. 2d 884 (C.A. 4). That heightened expectation, an important factor in *Coolidge* v. *New Hampshire*, 403 U.S. 443, may justify somewhat more circumscribed procedures than are necessary when a vehicle is not parked on the owner's private property.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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